SUPREME COURT OF THE UNITED STATES

No. 99–1185

MARK SELING, SUPERINTENDENT, SPECIAL COMMITMENT CENTER, PETITIONER *v.* ANDRE BRIGHAM YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 17, 2001]

JUSTICE STEVENS, dissenting.

A sexual predator may be imprisoned for violating the law, and, if he is mentally ill, he may be committed to an institution until he is cured. Whether a specific statute authorizing the detention of such a person is properly viewed as "criminal" or "civil" in the context of federal constitutional issues is often a question of considerable difficulty. See *Kansas* v. *Hendricks*, 521 U. S. 346 (1997) (reversing, by a 5 to 4 vote, a decision of the Kansas Supreme Court invalidating Kansas' Sexually Violent Predator Act); *Allen* v. *Illinois*, 478 U. S. 364 (1986) (upholding, by a 5 to 4 vote, Illinois' Sexually Dangerous Persons Act); *In re Young*, 122 Wash. 2d 1, 857 P. 2d 989 (1993) (en banc) (upholding, by a 5 to 4 vote, the provisions of Washington's Community Protection Act of 1990 dealing with sexually violent predators).

It is settled, however, that the question whether a state statute is civil or criminal in nature for purposes of complying with the demands of the Federal Constitution is a question of federal law. If a detainee comes forward with "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose *or effect* as to negate [the State's] intention' that the proceeding be civil, it must be considered criminal." *Allen,* 478 U. S., at 369 (quoting

United States v. *Ward*, 448 U. S. 242, 248–249 (1980)) (emphasis added). See also *Hudson* v. *United States,* 522 U. S. 93, 100, 105 (1997). Accordingly, we have consistently looked to the conditions of confinement as evidence of both the legislative purpose behind the statute and its actual effect. See *Hendricks*, 521 U. S., at 361, 367–369; *Schall* v. *Martin*, 467 U. S. 253, 269–271 (1984); *Allen*, 478 U. S., at 369, 373–374. As we have acknowledged in those cases, the question whether a statute is in fact punitive cannot always be answered solely by reference to the text of the statute.

The majority in this case, however, incorrectly assumes that the Act at issue is necessarily civil. The issue the majority purports to resolve is whether an Act that is otherwise civil in nature can be deemed criminal in a specific instance based on evidence of its application to a particular prisoner. However, respondent Young's petition did not present that issue. Rather, consistent with our case law, Young sought to introduce evidence of the conditions of confinement as evidence of the punitive purpose and effect of the Washington statute. See Amended Pet. for Writ of Habeas Corpus 6 and Supp. Brief on Remand 2, 6, 10–11, in No. C94–480C (WD Wash.), Record, Doc. Nos. 57, 155. As a result, Young in no way runs afoul of *Hudson* v. *United States*, 522 U. S. 93 (1997). Properly read, *Hudson* acknowledges that resolving whether an Act is civil or criminal in nature can take into account whether the statutory scheme has a punitive effect.[1] *Id.,* at 99.

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[1] In his concurrence, JUSTICE SCALIA concludes that, under the rule of *Hudson* v. *United States*, 522 U. S. 93 (1997), courts may *never* look to actual conditions of confinement and implementation of the statute to determine in the first instance whether a confinement scheme is civil in nature. See *ante,* at 1. JUSTICE THOMAS, concurring in the judgment, would take *Hudson* even further, precluding implementation-based challenges "at any time." *Ante*, at 4. However, for the reasons set out

What *Hudson* rejects is an approach *not* taken by respondent— one that bypasses this threshold question in favor of a dispositive focus on the sanction actually imposed on the specific individual.[2] *Id.*, at 101–102.

To be sure, the question whether an Act is civil or punitive in nature "is initially one of statutory construction." *Ante*, at 9 (majority opinion). However, under the majority's analysis, there is no inquiry beyond that of statutory construction. *Ante*, at 11. In essence, the majority argues that because the constitutional query must be answered definitively and because confinement is not a "fixed event," conditions of confinement should not be considered at all, except in the first challenge to a statute, when, as a practical matter, the evidence of such conditions is most likely *not* to constitute the requisite "clearest proof." This seems to me quite wrong. If conditions of confinement are such that a detainee has been punished twice in violation of the Double Jeopardy Clause, it is irrelevant that the scheme has been previously labeled as civil without full knowledge of the effects of the statute.[3]

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above, I believe that both concurrences misread *Hudson*. I also note that *Hudson* did not involve confinement. In cases that do involve confinement, this Court has relied on the principle that a statutory scheme must be deemed criminal if it was sufficiently punitive "either in purpose or effect." See *Kansas* v. *Hendricks*, 521 U. S. 346, 361, 367–369 (1997); *Schall* v. *Martin*, 467 U. S. 253, 269–271 (1984); *Allen* v. *Illinois*, 478 U. S. 364, 369, 373–374 (1986).

[2] In response to my dissent, the Court has made it clear that it is simply holding that respondent may not prevail if he merely proves that the statute is punitive insofar as it has been applied to him. The question whether he may prevail if he can prove that the statute is punitive in its application to everyone confined under its provisions therefore remains open. In sum, the Court has rejected the narrow holding of the Ninth Circuit, but has not addressed the sufficiency of the broadest claim that petitioner has advanced.

[3] In this case, those detained pursuant to Washington's statute have

In this case, Young has made detailed allegations concerning both the absence of treatment for his alleged mental illness and the starkly punitive character of the conditions of his confinement. If proved, those allegations establish not just that those detained pursuant to the statute are treated like those imprisoned for violations of Washington's criminal laws, but that, in many respects, they receive significantly worse treatment.[4] If those allegations are correct, the statute in question should be characterized as a criminal law for federal constitutional purposes. I therefore agree with the Court of Appeals' conclusion that respondent should be given the opportunity to come forward with the "clearest proof" that his allegations are true.

Accordingly, I respectfully dissent.

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sought an improvement in conditions for almost seven years. Their success in the courts, however, has had little practical impact.

[4] Under such conditions, Young has now served longer in prison following the completion of his sentence than he did on the sentence itself.